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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 609

MINNIE B. VAN DUSEN,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

JOSEPH E. DAVIES,
RAYMOND N. BEEBE,
RAYMOND H. BERRY,
ARTHUR L. EVELY,
Counsel for Petitioner.

INDEX.

Subject Index.

	Page
Petition for writ of certiorari	1
A. Summary statement of the matter involved	2
B. Statement as to the jurisdiction	4
C. The questions presented	5
D. Reasons relied on for the allowance of writ	6
E. Assignments of error	9
Brief in support of petition for writ of certroiari to the United States Circuit Court of Appeals for the Sixth Circuit	11
I. Opinions of the courts below	11
II. Statement as to the jurisdiction	12
III. Statement of the case	12
IV. Argument	14
1. The United States Circuit Court of Appeals for the Sixth Circuit erred in holding that the income of an insurance trust used to pay premiums on life insurance policies not on the life of the grantor is taxable to the grantor, in conflict with a decision of the United States Circuit Court of Appeals for the Fifth Circuit	14

Page

2. The United States Circuit Court of Appeals for the Sixth Circuit erred in determining that petitioner is subject to tax on the income of a trust used to pay premiums on life insurance policies not on her life, under Section 167(a) of the Revenue Acts of 1936 and 1938 17

3. The United States Circuit Court of Appeals for the Sixth Circuit erred in determining that petitioner is subject to tax on the income of a trust under Section 22(a) of the Revenue Acts of 1936 and 1938 in the absence of any finding that she retained any economic interest in such trust 19

4. The United States Circuit Court of Appeals for the Sixth Circuit erred in reversing the decision of the United States Board of Tax Appeals without analysis or criticism of the Board's findings of fact, without the finding of additional facts supporting its own judgment and without specification of errors of law in the Board's opinion 22

Cases Cited.

Page

Baldwin, Gail H., 36 B. T. A. 364 ..... 16, 18
Blumenthal, Lucy A., 30 B. T. A. 591 ..... 16, 18

Commissioner of Internal Revenue v. Amy B. Jergens, 127 Fed. (2d) 973 ..... 6, 14, 15, 16, 18
Commissioner of Internal Revenue v. Katz, Decided by the United States Circuit Court of Appeals for the Seventh Circuit on November 24, 1943 ..... 21, 23

Helvering v. Clifford, 309 U. S. 331 ..... 7, 20

Public Service Commission of Wisconsin v. Wisconsin Telephone Company, 289 U. S. 67 23

Railroad Commission of Wisconsin v. Maxcy, 281 U. S. 82 23

Law and Statutes Cited.

Judicial Code, Section 240 ..... 4, 12

Revenue Acts of 1936 and 1938:
Section 22(a) 5, 7, 8, 9, 15, 16, 19, 20, 22, 23
Section 167(a) 3, 5, 7, 8, 9, 15, 16, 17, 18

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

Minnie B. Van Dusen, by her counsel, respectfully prays that a writ of certiorari issue from this Court to review the judgment of the United States Circuit Court of Appeals for the Sixth Circuit entered in the above-entitled

cause on October 18, 1943, which judgment reversed a decision of the United States Board of Tax Appeals.

A.

Summary Statement of the Matter Involved.

Petitioner filed a petition in the United States Board of Tax Appeals (now The Tax Court of the United States) on December 21, 1940, for the redetermination of deficiencies in individual income taxes determined by the Commissioner of Internal Revenue for the calendar years 1936 and 1937 in the amounts of $21,296.51 and $10,159.83, respectively. On the same date petitioner filed in the United States Board of Tax Appeals a petition for the redetermination of a deficiency in individual income tax for the calendar year 1938 in the amount of $9,070.87, likewise determined by the Commissioner of Internal Revenue. All of these deficiencies resulted in the main from the determination by the Commissioner that a portion of the income of a certain trust created by petitioner as donor was taxable to her and not to the trustees of said trust. The portion of the income of the trust which the Commissioner determined to constitute income taxable to petitioner was that portion used to pay premiums on certain life insurance policies owned by the trust under which the petitioner was not the insured.

The two above cases were consolidated for hearing and decision and were heard by the United States Board of Tax Appeals on September 18, 1941. On June 20, 1942,

the United States Board of Tax Appeals entered its Memorandum Findings of Fact and Opinion (R. 39) in which it held that the income of the trust, used to pay premiums on life insurance policies not on the life of the grantor, was not taxable to the grantor under Section 167(a) of the Revenue Acts of 1936 and 1938. Accordingly, on August 3, 1942, the United States Board of Tax Appeals entered its orders determining that there were no deficiencies in individual income tax due from petitioner for the calender years 1936 and 1937 and determining a deficiency in income tax for the calendar year 1938 in the amount of $5.15, which deficiency was not based on the inclusion of any part of the income of said trust in the taxable income of petitioner but related to issues which were conceded (R. 44).

On October 23, 1942, the Commissioner of Internal Revenue filed a petition for the review of these decisions of the United States Board of Tax Appeals by the United States Circuit Court of Appeals for the Sixth Circuit. The said cause was entered and docketed in said Circuit Court of Appeals under the title "Commissioner of Internal Revenue, Petitioner, vs. Minnie B. Van Dusen, Respondent," and numbered 9480 on said docket.

Thereafter on October 14, 1943, the cause came on for hearing in the United States Circuit Court of Appeals for the Sixth Circuit before the Honorable Florence E. Allen, the Honorable Elwood Hamilton, and the Honorable John D. Martin. At the same time, a case involving a similar trust created by Charles B. Van Dusen was also heard by the Court. On October 18, 1943, a judgment was entered in both cases by said Circuit Court of Appeals reversing the decisions of the United States Board of Tax Appeals. No separate opinion was entered by said Court. The judgment aforesaid reads in full as follows:

"These companion cases came on to be heard upon the records and briefs and oral argument of counsel, it being stipulated by the parties in open court that the cases involve identical legal questions and that they should be forthwith heard, submitted and decided as one case.

On consideration whereof, it appearing that the Commissioner decided correctly in each case that the income of the trust for the taxable years, used to pay premiums on life insurance policies included in the trust estate, is taxable to the respondent under Sections 22(a) and 167(a) of the Revenue Acts of 1936 and 1938; Helvering v. Clifford, 309 U. S. 331; Helvering v. Horst, 311 U. S. 112; Helvering v. Stuart, 317 U. S. 154; Altmaier v. Commissioner, 116 Fed. (2d) 162 (C.C.A. 6), cert. denied 312 U. S. 706; Price v. Commissioner, 132 Fed. (2d) 95 (C.C.A. 6); Commissioner v. Wilson, 132 Fed. (2d) 255 (C.C.A. 6):

It is ordered, adjudged and decreed that the decision of the United States Board of Tax Appeals, now the Tax Court of the United States, be and it hereby is reversed and the case is remanded to the Tax Court of the United States for further proceedings in accordance with the statute and the order of this court."

B.

Statement As to the Jurisdiction.

The jurisdiction of this Court is invoked under Section 240 of the Judicial Code as amended by the Act of February 13, 1925 (43 Stat. 938), 28 U. S. C. 347, and June 7, 1934 (48 Stat. 926).

C.

The Questions Presented.

The questions involved in this proceeding are as follows:

1. Whether the United States Circuit Court of Appeals for the Sixth Circuit was in error in reversing the decision of the United States Board of Tax Appeals that petitioner, as grantor, is not subject to taxation on the income of a trust used to pay premiums on life insurance policies not on her life under Section 167 of the Revenue Acts of 1936 and 1938.

2. Whether the United States Circuit Court of Appeals for the Sixth Circuit was in error in reversing the United States Board of Tax Appeals and deciding that petitioner, as grantor, is subject to taxation on the income of a long-term trust which is not distributable to her or to members of her family and in which she retains no rights of reversion and no elements of control under Section 22(a) of the Revenue Acts of 1936 and 1938.

3. Whether the United States Circuit Court of Appeals for the Sixth Circuit was in error in reversing the decision of the United States Board of Tax Appeals without any determination that the Board's findings of fact were not supported by the evidence or any specification of errors of law in the Board's opinion.

D.

Reasons Relied On for the Allowance of Writ.

1. The judgment of the United States Circuit Court of Appeals for the Sixth Circuit in the instant case is in direct conflict with the decision of the United States Circuit Court of Appeals for the Fifth Circuit in the case of *Commissioner of Internal Revenue v. Amy B. Jergens*, 127 Fed. (2d) 973, affirming a Memorandum Opinion of the United States Board of Tax Appeals entered May 28, 1941. In the *Jergens* case the United States Board of Tax Appeals and the United States Circuit Court of Appeals for the Fifth Circuit determined that the grantor of an insurance trust was not taxable under Section 167 of the Revenue Acts of 1936 and 1938 in respect to the income of such trust, to the extent that such income was used to pay premiums on life insurance policies which were not upon her life. The insurance policies which constituted a part of the corpus of the trust in the *Jergens* case were upon the life of the husband of the grantor. The United States Circuit Court of Appeals for the Fifth Circuit likewise decided that the grantor retained no economic interest in the policies and, accordingly, was not subject to tax on the income of the trust under Section 22(a) of the Revenue Acts of 1936 and 1938. Since the facts in the instant case are not distinguishable in any material particular from the facts in the *Jergens* case, there is a direct conflict between the decision of the Circuit Court of Appeals for the Sixth Circuit in the instant case and that of the Circuit Court of Appeals for the Fifth Circuit in the *Jergens* case. This conflict of decisions in a matter

of vital importance to grantors of insurance trusts warrants the granting of this petition.

2. The Court below has decided an important question of Federal law which has not been, but which should be settled by this Court, namely, that income from a trust, used to pay premiums on life insurance policies, not on the life of the grantor, included in the trust estate, is taxable to the grantor.

Neither Section 167 nor 22(a) of the Revenue Acts of 1936 and 1938 provide for the taxation of the income of trusts to the grantors thereof in circumstances such as those here present. Section 167(a)(3) provides that a grantor shall be subject to tax on the income of a life insurance trust where the policies of life insurance in question are on the life of the grantor himself. The Court has erroneously held that this section imposes tax on the grantor where the policies are *not* on his life. This decision is in direct contravention of the statute. This application of Section 167 to the facts of the instant case constitutes a misinterpretation of a Federal statute of sufficient gravity to warrant the intervention of this Court.

3. While there is no printed opinion in the Court below, the citation of authorities in the judgment indicates that the Court misinterpreted and misapplied a decision or decisions of this Court.

In the case of *Helvering v. Clifford*, 309 U. S. 331, cited by the Court below, this Court determined that the income of a short-term trust over which the grantor had retained extensive elements of control and the corpus of which reverted to him upon its termination was taxable to the grantor under the provisions of Section 22(a) of the

Revenue Act of 1934. The Circuit Court of Appeals for the Sixth Circuit has erred in attempting to apply this principle in the instant case where the trust is not a short-term trust, where the grantor retained no element of control whatsoever, where there is no possibility of reversion of the trust corpus to her, *and where the income in question is neither distributable to her nor to any member of her family nor expendable for her benefit.* The application of Section 22(a) to the facts of the instant case threatens an extension of the principle enunciated by this Court in the *Clifford* case to trusts possessing real substance and where the grantor has retained no substantial economic benefits. This unwarrantably expands by judicial action the class of trusts, the income of which was determined by the Congress to be taxable to the grantors thereof. Such an extension of the application of Section 22(a) threatens to impose upon the grantors of all trusts created for the benefit of members of their families, tax liabilities never contemplated in the enactment of the Revenue Statutes. Moreover, the decision in the instant case constitutes an extension of the application of the Clifford principle to a point much beyond that which has been approved by certain other Circuit Courts of Appeal. The seriousness of this threatened imposition upon trust grantors and the substantial variations among the Circuit Courts of Appeal in their interpretation of the Clifford principle likewise warrant the intervention of this Court.

4. The United States Circuit Court of Appeals for the Sixth Circuit reversed the decision of the United States Board of Tax Appeals in the instant case through the entry of a judgment stating that the income of the trust in question was taxable to petitioner under Sections 22(a) and 167(a) of the Revenue Acts of 1936 and 1938 and remanded the case to the United States Board of Tax

Appeals without the entry of any opinion and without setting forth any reasons for its determination that the decision of the United States Board of Tax Appeals was erroneous. The judgment of the Circuit Court of Appeals for the Sixth Circuit is not consistent with the facts found by the Board of Tax Appeals. Nevertheless, the Circuit Court of Appeals did not determine that the Board's findings of fact and opinion were unsupported by the evidence nor did it find facts supporting its own judgment. This action constitutes a reversible error and departs so far from the accepted and usual practice of appellate tribunals as to warrant the intervention of this Court.

E.

Assignments of Error.

1. The United States Circuit Court of Appeals for the Sixth Circuit erred in determining that petitioner is subject to tax on the income of a trust used to pay premiums on life insurance policies not on her own life, under Section 167(a) of the Revenue Acts of 1936 and 1938.

2. The United States Circuit Court of Appeals for the Sixth Circuit erred in determining that petitioner is subject to tax on the income of a long-term trust which is not distributable to her, nor to members of her family and in which she retained no rights of reversion and no elements of control, under Section 22(a) of the Revenue Acts of 1936 and 1938.

3. The United States Circuit Court of Appeals for the

Sixth Circuit erred in reversing the decision of the United States Board of Tax Appeals without the entry of an opinion specifying findings of fact in support of its judgment or specifying errors of law in the Board's opinion.

WHEREFORE, petitioner prays that a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit be granted.

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IN THE

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No. .....

MINNIE B. VAN DUSEN,

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COMMISSIONER OF INTERNAL REVENUE.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

I.

Opinions of the Courts Below.

The United States Board of Tax Appeals entered its

Memorandum Findings of Fact and Opinion in this case on June 20, 1942. Said Memorandum Findings of Fact and Opinion were not reported. The opinion of the Board upheld the contentions of petitioner and no dissenting opinion was filed. On October 18, 1943, the United States Circuit Court of Appeals for the Sixth Circuit entered a judgment reversing the decision of the Board of Tax Appeals and remanding the case to the Board for entry of decision. The United States Circuit Court of Appeals did not enter any opinion in this cause and its judgment is reported in 138 Fed. (2d) 510.

II.

Statement As to the Jurisdiction.

The jurisdiction of this Court is invoked under Section 240 of the Judicial Code as amended by the Act of February 13, 1925 (43 Stat. 938), 28 U. S. C. 347, and June 7, 1934 (48 Stat. 926).

III.

Statement of the Case.

"On February 28, 1931, Minnie B. Van Dusen, the petitioner herein, created an irrevocable trust known as "The Minnie B. Van Dusen Insurance Trust," to which she transferred certain securities and certain life insurance

policies owned by her and issued on the life of her husband (R. 22). A portion of the income of the trust was used during the years 1936, 1937 and 1938, to pay premiums on these policies (R. 22-23). Upon the transfer of said securities and insurance policies in trust, the petitioner completely relinquished all rights of ownership and economic benefits therein and retained no reversionary interest in any part of the corpus of the trust whether the original corpus or accumulations added thereto. The petitioner was not a trustee of the trust and retained no powers with respect to its control or management (R. 23-39). The only interest petitioner, as grantor, had in the trust was that, in the event her husband predeceased her, she became entitled to the net income received by the trust, subsequent to that event. The trust was irrevocable, not subject to amendment, and continued throughout the lifetime of the grantor and until remaindermen, the grantor's children, attained specified ages (R. 23-39).

In notices of deficiency relating to the three said years, 1936, 1937 and 1938, the Commissioner of Internal Revenue determined that the income of the trust used to pay insurance premiums was taxable to petitioner as grantor of the trust. Petitioner appealed from these determinations to the United States Board of Tax Appeals which, in a Memorandum Findings of Fact and Opinion entered on June 20, 1942, sustained petitioner's contention that she was not subject to tax in respect to the trust income used to pay insurance premiums. The Commissioner of Internal Revenue appealed from the decision of the Board to the United States Circuit Court of Appeals for the Sixth Circuit, which, on October 18, 1943, without an opinion, entered a judgment reversing the decision of the Board of Tax Appeals and remanding the case to the Board for entry of decision.

IV.

ARGUMENT.

1. The United States Circuit Court of Appeals for the Sixth Circuit erred in holding that the income of an insurance trust used to pay premiums on life insurance policies not on the life of the grantor is taxable to the grantor, in conflict with a decision of the United States Circuit Court of Appeals for the Fifth Circuit.

The judgment of the United States Circuit Court of Appeals for the Sixth Circuit in the instant proceeding, holding that income of The Minnie B. Van Dusen Insurance Trust used to pay premiums on life insurance policies on the life of the grantor's husband was taxable to her, is in conflict with decisions of the United States Board of Tax Appeals in other cases and the decision of the United States Circuit Court of Appeals for the Fifth Circuit in the case of *Commissioner of Internal Revenue v. Amy B. Jergens*, 127 Fed. (2d) 973 (affirming the Memorandum Opinion of the Board of Tax Appeals entered May 28, 1941). In the *Jergens* case the taxpayer had created a trust to which she had transferred certain securities, together with life insurance policies on the life of her husband. The trust agreement provided that the income of the trust should be used, first, to pay the premiums on the life insurance policies and a small annuity to a named beneficiary. Any remaining net income was to be paid to the taxpayer during her lifetime. The taxpayer's husband, the insured under the policies, was given the right to withdraw any part of the corpus at any time,

except the policies themselves, and the power to alter, modify or amend the trust agreement. The trust was to terminate upon the death of the taxpayer with the corpus distributable to her husband, if living, and otherwise, to her issue and other beneficiaries. Upon reviewing these facts the Board of Tax Appeals decided that the income of the trust used to pay the insurance premiums was not taxable to the grantor under any provision of Section 167(a) of the Revenue Acts of 1936 and 1938. It held that Section 167(a)(3) explicitly provides that the grantor shall be taxable on the income of a life insurance trust used to pay premiums on policies of life insurance on his *own* life and was therefore inapplicable. On appeal the United States Circuit Court of Appeals for the Fifth Circuit affirmed the Board and held that the income in question was not taxable to the grantor under any provision of Section 167(a) and, further, that it was not taxable to the grantor under Section 22(a). The Court determined that the grantor had retained no economic interest in the policies in question.

The facts in the instant proceeding are identical with the facts in the *Jergens* case in all material respects. In both cases the grantor had established a funded life insurance trust which provided that the income was to be used as far as necessary to pay premiums on life insurance policies *not* on the life of the grantor. In the *Jergens* case any excess income was payable to the grantor. In the instant case such excess income was payable to the grantor only at the discretion of the trustees who had an interest adverse to the grantor. (Here the excess income of the trust was not in fact distributed and the Commissioner of Internal Revenue does not seek to tax it to the grantor.) After the death of the insured the entire income of both the *Jergens* trust and the Minnie B. Van Dusen

Trust was payable to the grantor. Various powers to withdraw corpus and to alter, amend, and revoke were lodged by the grantor of the *Jergens* trust in her husband, but no such powers were retained by the grantor or given to her husband or any other person in the instant case. In so far as the application of Section 167(a) is concerned, the facts of the *Jergens* case and the instant case are indistinguishable. Neither did the grantor of either trust retain any economic benefits which would subject her to taxation under Section 22(a) although in the *Jergens* case certain powers were lodged by the grantor in her sponse, which was not true in the Minnie B. Van Dusen Trust.

It is therefore apparent that the judgment of the United States Circuit Court of Appeals for the Sixth Circuit is in direct conflict with the decision of the United States Circuit Court of Appeals for the Fifth Circuit in the *Jergens* case. This judgment is likewise in conflict with the decisions of the United States Board of Tax Appeals in the cases of *Lucy A. Blumenthal*, 30 B. T. A. 591 (reversed on another issue, 296 U. S. 552), and *Gail H. Baldwin*, 36 B. T. A. 364.

2. The United States Circuit Court of Appeals for the Sixth Circuit erred in determining that petitioner is subject to tax on the income of a trust used to pay premiums on life insurance policies not on her life, under Section 167(a) of the Revenue Acts of 1936 and 1938.

In its judgment issued in this proceeding the United States Circuit Court of Appeals for the Sixth Circuit determined that petitioner was taxable on the income of The Minnie B. Van Dusen Insurance Trust under Section 167(a) of the Revenue Acts of 1936 and 1938, despite the fact that the insurance policies in the trust were not on the life of the petitioner. Section 167(a) provides as follows:

> "(a) Where any part of the income of a trust—
>
> (1) is, or in the discretion of the grantor or of any person not having a substantial adverse interest in the disposition of such part of the income may be, held or accumulated for future distribution to the grantor; or
>
> (2) may, in the discretion of the grantor or of any person not having a substantial adverse interest in the disposition of such part of the income, be distributed to the grantor; or
>
> (3) is, or in the discretion of the grantor or of any person not having a substantial adverse interest in the disposition of such part of the income may be, applied to the payment of premiums upon policies of insurance on the life of the grantor (except policies of insurance irrevocably payable for the purposes and in the manner specified in section 23(o), relating to the so-called 'charitable contribution' deduction);

> then such part of the income of the trust shall be included in computing the net income of the grantor."

Since the income of the trust here in question was used to pay insurance premiums, it is apparent that such income was neither distributed to the grantor nor held or accumulated for future distribution to her. Clauses (1) and (2) of the quoted statute are therefore inapplicable. Clause (3) is inapplicable by its very terms since it applies only to portions of trust income used to pay premiums upon policies of insurance on the life of the grantor. The policies owned by The Minnie B. Van Dusen Trust were on the life of the grantor's spouse. It is apparent, therefore, that Section 167(a) is not applicable to the facts of this proceeding and that the United States Circuit Court of Appeals for the Sixth Circuit is in error in so determining. That Section 167(a) is inapplicable to trusts of this type was decided, not only by the United States Board of Tax Appeals in its decision in the instant proceeding, but by the same tribunal in the cases of *Lucy A. Blumenthal, supra,* and *Gail H. Baldwin, supra,* and by the Circuit Court of Appeals for the Fifth Circuit in the case of *Commissioner of Internal Revenue v. Amy B. Jergens, supra.*

3. The United States Circuit Court of Appeals for the Sixth Circuit erred in determining that petitioner is subject to tax on the income of a trust under Section 22(a) of the Revenue Acts of 1936 and 1938 in the absence of any finding that she retained any economic interest in such trust.

The United States Board of Tax Appeals had before it the question of whether petitioner was subject to tax on the income of The Minnie B. Van Dusen Trust under Section 22(a) of the Revenue Acts of 1936 and 1938. However, the Board did not determine that petitioner was subject to tax under this section nor did it make any findings of fact which would support such a conclusion. The record in this proceeding makes it clear that the trust in question was a long-term trust which continued throughout the lifetime of the grantor and until her children attained the age of forty (40) years; that the income in question was not distributable either to the grantor or to any member of her family; that the grantor was not a trustee and that she retained no elements of control whatsoever over the management and operation of the trust. Moreover, the findings of fact of the United States Board of Tax Appeals are bare of any suggestion that the grantor in the instant case retained for herself, or could derive from the operation of the trust, any economic benefit whatsoever. The fact that the grantor's husband created a similar insurance trust does not alter this conclusion, since she was not a beneficiary of her husband's trust. These were not reciprocal or cross trusts, since neither spouse could derive any benefit from the trust set up by the other. Nevertheless, the United States

Circuit Court of Appeals for the Sixth Circuit, in the absence of any facts of record or any findings of fact by the Board supporting such a conclusion, held that the income of the trust was taxable to the grantor under Section 22(a).

Aside from the procedural error involved in such a determination, it is submitted that the Circuit Court of Appeals for the Sixth Circuit in its decision has attempted to extend the application of the principle laid down by this Court in the case of *Helvering v. Clifford*, 309 U. S. 331, far beyond any limits contemplated by this Court. In the *Clifford* case this Court held that the income of a short-term trust was taxable to the grantor where he retained control by making himself the trustee, where the income was distributable to his wife and therefore available for use "within an intimate family group," and where the corpus was to revert to him upon termination. It is apparent that the extension of what has come to be known as the "Clifford principle" to trusts of the type present in the instant proceeding threatens to impose upon the grantors of family trusts tax liabilities never contemplated by the Congress in the enactment of the Revenue Statutes, nor, it is respectfully submitted, by this Court in the decision of the *Clifford* case. If the grantor of a trust is to be taxed upon the income thereof despite the fact that the trust continues throughout his lifetime, that the income cannot be used by him or for his benefit or be distributed to any member of his family for current use within the family group and despite the further fact that he has divorced himself completely from the control of the trust, then, in effect, the creation of trusts for the benefit of grantors' children or other members of their families will, in practice, be made impossible.

Finally there has developed among the Circuit Courts of Appeal variations in the interpretation of the decision of this Court in the *Clifford* case which have resulted in widely differing applications of the Clifford principle in different parts of the country. This fact was recognized by the Circuit Court of Appeals for the Seventh Circuit in *Commissioner of Internal Revenue v. Katz*, decided November 24, 1943, which stated:

> "We think it would be well near useless to attempt to analyze the cases which have sought to apply or distinguish the doctrine of the *Clifford* case, and we shall not do so. It appears from such cases that there is some contrariety of opinion as to the extent to which the doctrine of that case should be given effect."

In the instant case the Circuit Court of Appeals for the Sixth Circuit has applied Section 22(a) to a situation where it seems clear that the Circuit Court of Appeals for the Seventh Circuit would have found it inapplicable. This "contrariety" of opinion among the Circuit Courts of Appeals results in the imposition of discriminatory burdens upon the grantors of trusts living in certain parts of the United States.

4. The United States Circuit Court of Appeals for the Sixth Circuit erred in reversing the decision of the United States Board of Tax Appeals without analysis or criticism of the Board's findings of fact, without the finding of additional facts supporting its own judgment and without specification of errors of law in the Board's opinion.

In this proceeding the United States Board of Tax Appeals entered a Memorandum Findings of Fact and Opinion in which the Board analyzed the provisions of The Minnie B. Van Dusen Insurance Trust. The Board found, as a fact, that the trust in question was not a short-term trust, that its income was not currently distributable to the grantor and could not be accumulated for future distribution to her and that no part of the income of the said trust had ever been distributed to her or to any other person. The Board did not find that the grantor retained any control over the trust of which she was not one of the trustees, that she retained any reversionary interest in the corpus or income thereof or that she enjoyed any economic benefit of any kind as a result of the creation of the trust, although the application of Section 22(a) of the Revenue Act of 1938 was an issue in this proceeding. The United States Circuit Court of Appeals for the Sixth Circuit entered its judgment reversing the Board without any opinion analyzing the findings of fact entered by the Board and without finding any additional facts. Nevertheless, the Court ruled as a conclusion of law that the income of the trust was taxable to the grantor under Section 22(a), a result which, it is submitted, is erroneous and improper in the absence of any factual determination supporting the proposition that the grantor retained any interest or advantage from the

trust. In similar cases, other Circuit Courts of Appeal have declined to review the finding of fact of the trial Court that the grantor retained no economic benefit warranting taxation under Section 22(a). See *Commissioner of Internal Revenue v. Katz*, decided by the United States Circuit Court of Appeals for the Seventh Circuit on November 24, 1943. Furthermore, the United States Circuit Court of Appeals for the Sixth Circuit reversed the determination of the Board that the income of the trust in question was not taxable to the grantor under Section 167(a) without any opinion specifying the errors of law, if any, committed by the Board in reaching its result.

The Court accordingly erred in basing its judgment on a conclusion which is not supported by any facts of record and is not supported by any facts found by the tribunal below. Moreover, the reversal of the decision of the United States Board of Tax Appeals by the United States Circuit Court of Appeals for the Sixth Circuit, without the entry of any opinion analyzing the facts and the principles of law relied upon by the Court below, is contrary to sound and established judicial procedure of appellate tribunals. It is recognized that in affirming a lower Court, an appellate Court is not required to issue a written opinion. Here, however, the lower Court was reversed by the appellate authority. This Honorable Court has recognized the impropriety of a judicial tribunal reversing a quasi judicial administrative body without a statement of the grounds of its decision, both as to the facts and the law. *Public Service Commission of Wisconsin v. Wisconsin Telephone Company*, 289 U. S. 67; *Railroad Commission of Wisconsin v. Maxcy*, 281 U. S. 82.

The failure of the United States Circuit Court of Appeals for the Sixth Circuit to find facts supporting its conclusion and to explain the basis of its reversal of the decision of the Board constitutes a serious and unwarranted departure from the usual course of judicial proceedings.

WHEREFORE, in the light of the foregoing reasons, it is respectfully urged that the petition of Minnie B. Van Dusen for writ of certiorari filed herewith be granted by this Honorable Court.

Respectfully submitted,

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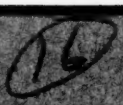

Office - Supreme Court, U.
FILED
FEB 8 1944
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No. 609

In the Supreme Court of the United States

OCTOBER TERM, 1943

MINNIE B. VAN DUSEN, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes and regulations involved	2
Statement	2
Argument	5
Conclusion	6

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OPINIONS BELOW

The opinion of the United States Board of Tax Appeals (R. 39–44) is a memorandum opinion not officially reported. The opinion of the Circuit Court of Appeals (R. 55) is reported in 138 F. 2d 510.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered October 18, 1943 (R. 55). The petition for a writ of certiorari was filed January 15, 1944. Jurisdiction of this Court is invoked

under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether, when the taxpayer created a trust to pay the premiums on insurance policies on the life of her husband, and at the same time the husband created a similar trust to pay the premiums on insurance policies on the life of the wife, the income of the taxpayer's trust so employed constitutes taxable income of the taxpayer under Sections 22 (a) and 167 of the Revenue Acts of 1936 and 1938.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in the Appendix to the Commissioner's brief in the companion case of Charles B. Van Dusen (No. 608).

STATEMENT

The taxpayer on February 28, 1931, created an irrevocable trust of which her four sons were trustees. She assigned to the trust 31,250 shares of the common stock of S. S. Kresge Company and 34 life insurance policies on the life of her husband, Charles B. Van Dusen, in the aggregate amount of $990,000. (R. 40–41.)

The trust agreement, which is set out in full as Joint Exhibit A–1 (R. 23–39), provided in paragraphs 3 and 4 that the trustees should col-

lect the income of the trust and apply the same insofar as necessary to the payment of the premiums upon the assigned insurance policies upon the life of the husband (R. 25–26, 41). Should the income of the trust exceed the amount necessary for the payment of the premiums, the trustees had absolute discretion either to pay the excess to the taxpayer or to add the same to the corpus of the trust (R. 26, 41).

The trust further provided (Par. 5) that on the death of Charles B. Van Dusen the trustees should collect the proceeds from life insurance policies on his life and add them to the principal of the trust. The entire net income of the augmented trust should be paid to the grantor, Minnie B. Van Dusen, for her life. (R. 26–27, 41–42.)

On the death of the grantor, the taxpayer herein, the trustees were directed to divide the trust estate into four equal parts for the benefit of the taxpayer's four sons, paying to each of them the income until he attained the age of 40, and on attaining such age, his share of the principal. There were detailed provisions for the distribution of the corpus and income of the trust, if any son should predecease the taxpayer, or die before reaching the age of 40, to the surviving issue or spouse of each son, or if none, to the surviving brother. (Par. 6, R. 27–32, 42.)

The trustees were further empowered to use any portion of the principal of the trust to pur-

chase property from or to make loans to the executors and/or trustees of the estate of Charles B. Van Dusen, if deemed by them to be for the best interests of the beneficiaries of the trust (R. 33).

It also appears from the companion case of *Charles B. Van Dusen* v. *Commissioner,* No. 608, heard, submitted and decided by the Circuit Court of Appeals as one case with the instant case (R. 55), that on February 26, 1931, two days before the execution of the trust instrument here involved, her husband, Charles B. Van Dusen, executed to the same trustees a corresponding instrument of trust to pay the premiums on her life insurance (No. 608, R. 30–43). In his case the fund of the trust consisted of 10,000 shares of the common stock of S. S. Kresge Company and insurance policies on the life of his wife, Minnie B. Van Dusen, in the aggregate amount of $200,000 (No. 608, R. 45). The net income of this trust, on the death of the wife, was payable 50 per cent to the grantor for life, and 50 per cent to be divided equally among his surviving children. The trustees of that trust were empowered to purchase property from or to loan money to the estate of the wife, Minnie B. Van Dusen. The other provisions of the trust were substantially identical with those of the trust created by Minnie B. Van Dusen.

The Commissioner of Internal Revenue determined that the portion of the income of the trust created by the taxpayer used to pay the premiums on the life insurance of the husband constituted taxable income of the taxpayer (R. 8–12, 17–20). He also determined that the portions of the income of the trust created by the husband used to pay premiums on the life insurance of the wife constituted taxable income of the husband. (No. 608, R. 10–15, 20–23.)

The Board of Tax Appeals upset this determination with respect to each of the trusts (R. 39–44, No. 608, R. 44–48). The Circuit Court of Appeals in one judgment (R. 55, No. 608, R. 61) reversed and remanded each case to the Tax Court for "further proceedings in accordance with the statute and the order of this court."

ARGUMENT

The present case involves the identical issues presented in the case of *Charles B. Van Dusen* v. *Commissioner,* No. 608. The argument of the Commissioner in that case is therefore made, by reference, his argument in the present case.

CONCLUSION

There is no conflict and the decision below is correct. The petition for certiorari should be denied.

Respectfully submitted,

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FEBRUARY 1944.

U. S. GOVERNMENT PRINTING OFFICE: 1944

17

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REPLY BRIEF FOR PETITIONER

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INDEX.

	PAGE
Introductory statement	1
Argument	2
Conclusion	2

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REPLY BRIEF FOR PETITIONER

INTRODUCTORY STATEMENT

On January 15, 1944, petitioner filed a petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit and a brief in support thereof. On February 8, 1944, the respondent filed a brief in opposition to the granting of this petition. In his brief respondent incorporates by reference his argument presented in the brief in opposition which he filed as of

the same date in the case of *Charles B. Van Dusen v. Commissioner of Internal Revenue*, No. 608. This brief is filed by petitioner as a reply brief to respondent's brief in opposition.

ARGUMENT

The present case involves the identical issues presented in the case of *Charles B. Van Dusen v. Commissioner of Internal Revenue*, No. 608. The argument of petitioner in reply to respondent's argument in his brief in opposition in that case is therefore made, by reference, her argument in the present brief.

CONCLUSION

WHEREFORE, it is respectfully urged that the petition of Minnie B. Van Dusen for a writ of certiorari be granted.

Respectfully submitted,

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